Nos. 91-1111 and 91-1128

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

HARTFORD FIRE INSURANCE CO., et al.,
Petitioners,

vs.

STATE OF CALIFORNIA, et al.,
Respondents.

MERRETT UNDERWRITING AGENCY MANAGEMENT LIMITED, et al.,
Petitioners,

vs.

STATE OF CALIFORNIA, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER STURGE REINSURANCE SYNDICATE MANAGEMENT LIMITED IN NO. 91-1128

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January 22, 1993

STATEMENT PURSUANT TO RULE 29.1

Sturge Reinsurance Syndicate Management Limited, successor in interest to Oxford Syndicate Management Ltd. (also sued herein as K.F. Alder & Others (U.A.) Ltd.), is wholly owned by Sturge Group PLC.

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Petitioner Sturge Reinsurance Syndicate Management Limited, successor in interest to Oxford Syndicate Management Ltd. (also sued herein as K.F. Alder & Others (U.A.) Ltd.) (hereinafter referred to as "K.F. Alder"), respectfully submits this reply brief on the merits in Petition No. 91-1128.

In their briefs, the plaintiffs continue, without justification, to treat all of the British defendants as identical and interchangeable.[1] Nowhere in their briefs do the plaintiffs separately address the propriety of asserting subject matter jurisdiction over the claims against K.F. Alder. K.F. Alder has submitted a separate brief to this Court precisely because the allegations and claims against it are far narrower than those against certain other foreign defendants (including foreign reinsurers), and provide no justification for subjecting K.F. Alder to the United States antitrust laws.[2]

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1. The British defendants include individual Lloyd's of London ("Lloyd's") underwriters, independent syndicates of underwriters at Lloyd's, London insurance companies ("London Market Companies") and Lloyd's and London market brokers. Although the plaintiffs admit that each individual defendant, each syndicate at Lloyd's and each of the London Market Companies is a separate and independent entity, they nevertheless conveniently ignore this fact for the purposes of this motion. JA-11, 13-17 (Cal. Compl. ¶¶ 4(t), (v), 12-23, 31); JA-61-71 (Conn. Compl. ¶¶ 4(h), (u), 6-37). (Numbers following the letters "JA" denote reference to the Joint Appendix.)

2. The plaintiffs offer no support for their attempt to use the claims and allegations against other defendants to support jurisdiction over K.F. Alder. Only the state plaintiffs (the "States") have even attempted to justify their position. However, the only case cited by the States, *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), is inappositive. *Continental Ore* held that in calculating damages for an antitrust violation the jury may consider all aspects of the entire conspiracy. *Id.* at 699. Nor do the States gain any support for their position from their reference to the Hartford petitioners' observation that "'[p]rimary insurers and reinsurers are uniquely intertwined and interdependent.'" Brief for Respondent States in No. 91-1128, dated December 23, 1992 ("States Brief") at 18. Again, the States presume an identity of interest among all insurers and reinsurers. Whether or not K.F. Alder would agree with the Hartford petitioners' characterization, K.F. Alder is not alleged to have conspired with any primary insurers in the claims before this Court. Actions allegedly taken in furtherance of

(continued...)

ARGUMENT

I.

THERE IS NO JURISDICTION OVER THE CLAIMS AGAINST K.F. ALDER

In this case of first impression, K.F. Alder asks this Court to consider the appropriate limits to the jurisdictional reach of United States antitrust law. K.F. Alder does not dispute that United States antitrust law, under certain circumstances, extends to conduct and actors outside the United States. However, in cases of legitimate extraterritorial application of United States antitrust law to wholly foreign actors, at least three factors have been present: (1) the conduct challenged has been a consensus wrong, that is, a targeted cartel or a coercive boycott (or both combined); (2) the challenged conduct has been implemented in the United States; and (3) the defendants have been the prime actors at the core of the conspiracy. Not one of these factors is present in this case.

While it could be argued that each one of the above elements should be a necessary condition to extraterritorial jurisdiction, the absence of all three factors must define the limits to legitimacy.[3]

2.(...continued)
any conspiracy in which K.F. Alder is not alleged to have joined cannot justify an assertion of jurisdiction over the claims that name K.F. Alder.

3. In the absence of these three factors, the exercise of extraterritorial jurisdiction would violate the principle of proportionality. According to the principle of proportionality, which is a principle of constitutional dimension in the European Community, no measure may be taken or jurisdiction entertained where the burden it imposes is excessive in view of its objectives. Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr - Und Vorratsstelle Fur Getreide Und Futtermittel*, [1970] E.C.R. 1125. As to K.F. Alder, the burden would be excessive in view

(continued...)

There are consensus wrongs that victim nations should have some scope to regulate, but there are also consensus economic freedoms to engage in transactions that are efficient and progressive. A nation and its citizens must be allowed wide scope for defining such transactions, lest we clog another nation's markets, impose unfair and costly burdens on firms and people from other cultures who could have no notice of a wrong, and generally interfere with the efficient flow of goods and services in the world. *Cf. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 (1986) ("American antitrust laws do not regulate the competitive conditions of other nations' economies."). Thus, economics, fairness and respect for other nations should counsel this Court to declare a limiting principle on extraterritorial jurisdiction. Indeed, there is a compelling need to constrain the reach of a nation's laws in order to legitimate expansive jurisdiction where necessary to deal with consensus wrongs. Under such a limiting principle, a defendant such as K.F. Alder who fails to satisfy each of the three jurisdictional prerequisites is beyond the reach of United States antitrust law.

A. K.F. Alder Is Not Alleged To Have Engaged In Any Coercive Conduct

This is an action challenging a purported boycott: an alleged effort of insurers and reinsurers to withhold insurance coverage in order to coerce other insurers to stop offering pollution and long-

3.(...continued)
of the justifications, and assertion of jurisdiction would therefore violate the fundamental right of proportionality.

tail coverage.[4] *See* States Brief at 5-7; Brief for Respondents (Private Party Plaintiffs) ("Private Party Plaintiffs' Brief") at 39-41. Coercive boycotts by firms with market power are illegal under United States law, and coercive boycotts targeted at Americans even by foreign actors are normally within United States subject matter jurisdiction and subject to the exercise of that jurisdiction unless comity counsels otherwise. Indeed, a long reach of jurisdiction may be required to protect a nation against consensus and egregious wrongs such as coercive cartels. But that is not this case. In this case, K.F. Alder is not alleged to have engaged in any coercive conduct or to have committed any consensus wrong.

The claims against K.F. Alder, unlike other claims in the complaint, do not allege any coercive conduct. JA-45-46 (Cal. Compl. ¶¶ 136-40); JA-94-97 (Conn. Compl. ¶¶ 130-39). The Sixth Count of the California Complaint alleges that in effectuating a purported conspiracy the British defendants:

> (a) conduct[ed] meetings and discussions among themselves to agree on the exclusive terms under which they would reinsure North American CGL risks;
>
> (b) agree[d] to exclude from all casualty treaty reinsurance written in London all pollution coverage for North American risks.

4. For example, in explaining their case for extraterritorial jurisdiction, the States assert: "The Reinsurers withheld reinsurance, an essential input of American primary insurance, from American insurers in order to compel them not to offer coverage in American insurance markets." States Brief at 5 (emphasis deleted).

JA-46 (Cal. Compl. ¶¶ 139(a), (b)); *see also* JA-95 (Conn. Compl. ¶ 133).[5] This is obviously not a boycott claim, and it is not a claim of a cartel (*i.e.*, a naked agreement to override the market). Rather, it is a description of cooperative behavior among firms that jointly insure risks as to the scope of the risks they will insure. The allegation is that certain underwriters set limits on the scope of their joint product and that the limits excluded pollution coverage. The plaintiffs admit that the reinsurers entered into the alleged agreements "in order to simultaneously reduce financial exposure to such risks and to increase underwriting profits therefrom." JA-89 (Conn. Compl. ¶ 117). The District Court credited the plaintiffs' characterization and explicitly found that the agreements had a legitimate business purpose. A-76-77. *See* A-68 ("negotiations over the terms and conditions on which risks will be accepted and insured are integral to the functioning of the [London reinsurance] market").

Plaintiffs' only specific conduct allegation against K.F. Alder confirms that K.F. Alder has been joined only as a joint venturer. As to K.F. Alder, the plaintiffs allege only that K.F. Alder attended a risk discussion meeting in London and agreed with its joint venturers as to the risks they would collectively assume. JA-32 (Cal. Compl. ¶¶ 94-95); JA-84-85 (Conn. Compl. ¶¶ 98-99). There is not a single allegation of any coercive conduct by K.F. Alder.[6] The alleged agreements challenged by the plaintiffs relate to the risks the participants would share. There were no naked agreements to eliminate competition among the participants.

Here, as in *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 20 (1979), the product that is the subject of the alleged agreements cannot be made available absent cooperation

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5. The California and other first wave complaints include only one claim (Count 6) against K.F. Alder and do not allege any conduct that can properly be characterized as a boycott. JA-45-46 (Cal. Compl. ¶¶ 136-40); *see* JA-94-97 (Conn. Compl. ¶¶ 130-39). In apparent recognition of the inability of such a claim to sustain subject matter jurisdiction with respect to K.F. Alder, the second wave complaints name K.F. Alder in two additional claims without adding a single factual allegation against K.F. Alder. JA-88-90, 95-97 (Conn. Compl. ¶¶ 115-19, 135-39). The first "new" claim for "global conspiracy" was dismissed by both courts below because it failed to allege how the separate conspiracies allegedly became a single global conspiracy. A-64-65; A-26-27. (Numbers following the letter "A" denote reference to the Appendix to the Petition for Certiorari in No. 91-1128.) The "global conspiracy" claim is not before this Court. The second "new" claim against K.F. Alder (Count 5 of the Connecticut Complaint) specifically alleges a boycott without adding to the single factual allegation that forms the basis for Count 6 in the California Complaint. JA-96 (Conn. Compl. ¶ 138(b)). However, the second round plaintiffs cannot change the true nature of their noncoercive claim (Count 6 of the California Complaint) simply by alleging a boycott without any factual allegations to substantiate the conclusory label. *See, e.g., Kramer v. Secretary, United States Dept. of Army*, 653 F.2d 726, 729 (2d Cir. 1980) (court must "look[] beyond the label to the facts alleged" in reviewing a complaint); *Hinton v. Hinton*, 436 F.2d 211, 212 (D.C. Cir. 1970) (same), *aff'd*, 492 F.2d 669 (D.C. Cir. 1974). The allegations against K.F. Alder do not assert any coercive conduct which could support this claim, and plaintiffs cannot change the nature of the acts by attaching the label "boycott" to them.

6. The States' suggestion that they have offered this Court so little factual support for their conclusory allegations because "no discovery on the merits has yet been allowed," States Brief at 40, is belied by the record. The filing of the complaints followed two year investigations conducted by the regulatory agencies of several states. A-34, 78. Moreover, the District Court gave the parties a full opportunity to conduct any discovery relevant to the issues raised in the instant motions. A-78. The District Court's pre-trial order stated that "[a]fter motions have been filed, upon specific request by any party having to respond to a motion, the Court may permit specified discovery for that purpose." JA-105 (District Court Pre-Trial Order No. 2, dated September 8, 1988). The plaintiffs failure to avail themselves of this opportunity does not excuse their inability to establish subject matter jurisdiction at this late date.

among the participants. By its nature, treaty reinsurance involves the underwriting of extremely large risks. The plaintiffs admit that the spreading of these large risks in the London reinsurance market necessarily requires collective activity. A-68; JA-11, 17 (Cal. Compl. ¶¶ 4(u), 28, 31); JA-61 (Conn. Compl. ¶ 4(g)). As a result, treaty reinsurance requires negotiations over the terms and conditions on which risks will be accepted and insured among the numerous subscribers. A-68; JA-11, 17 (Cal. Compl. ¶¶ 4(u), 28, 31); JA-61 (Conn. Compl. ¶ 4(g)). Agreements as to the risks the reinsurers will collectively assume are essential to the operation of the London reinsurance market and are permitted by British law. A-73; JA-263 (The Restrictive Trade Practices (Services) Order 1976, S.I. 1976 No. 98, Schedule ¶ 8); JA-291 (Competition Act of 1980, § 2, vol. 47 Trade & Industry (PT 1)).

As both courts below found, there are legitimate business reasons for the British defendants, including K.F. Alder, to join together and agree to the terms on which they would underwrite risks. A-31; A-76-77. In fact, the plaintiffs themselves acknowledge the legitimate business reasons for the purported agreements by alleging that these agreements were designed to "reduce [the reinsurers'] financial exposure to such risks . . . ." JA-89 (Conn. Compl. ¶ 117). Thus, these joint underwriting agreements could not possibly qualify as naked restraints or consensus wrongs under the law of nations. *See* Brief for Petitioner Sturge Reinsurance Syndicate Management Limited in No. 91-1128, dated November 19, 1992 ("K.F. Alder Opening Brief") at 21-22.

The British Government has an "obvious legitimate interest in the stability and reliability of the insurance and reinsurance market in its territory." *See* Brief for the Government of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Petitioners, dated November 19, 1992 at 13. "[T]he

requirement of a minimum solvency margin cannot by itself secure the financial stability of any insurer." *Id.* at 11. The insurers themselves have the obligation "not [to] take on unreasonable or unpredictable risks." *Id.* When reinsurers jointly underwrite the same portfolio of risks, they must make prudential decisions jointly. They must be free to determine whether coverage of pollution risks is reasonable and feasible as opposed to uneconomic and potentially financially disabling. Where (as here) co-underwriters do this and no more, they are engaged in justifiable business conduct. It would be extraordinary for an American court to second guess the expert firms' prudential judgment and determine that it was not too risky for the British underwriters to have extended their product and indeed that United States antitrust law required them to do so.

K.F. Alder's argument to this Court is not based on a conflict of substantive law. There is no conflict between American and British law on the legality of straightforward, noncoercive cooperation among joint underwriters. Such conduct is natural, necessary and normal around the world. At worst, under United States law, the agreement would be judged under a rule of reason to allow consideration of its procompetitive, efficiency-enhancing qualities. *See National Collegiate Athletic Assoc. v. Board of Regents of the Univ. of Oklahoma*, 468 U.S. 85, 98-104 (1984) (joint selling arrangements must be judged under rule of reason in an industry in which such arrangements are necessary if the product is to be sold at all); *Broadcast Music, Inc.*, 441 U.S. at 16-24 (blanket licensing practices, under which numerous individuals market their copyrighted musical compositions jointly, where it would be uneconomical for them to do so individually, have procompetitive properties and must be judged under a rule of reason); *National Bankcard Corp. v. VISA U.S.A., Inc.*, 779 F.2d 592, 605 (11th Cir.) (joint fixed-fee arrangement, necessary to the marketing of a universally accepted credit card, was procompetitive

and thus upheld under rule of reason analysis), *reh'g denied*, 785 F.2d 1037 (11th Cir.), *cert. denied*, 479 U.S. 923 (1986).

Undoubtedly cognizant of the benign nature of collaboration among reinsurers, the plaintiffs try to link these agreements to the claims of coercive boycott and to sweep K.F. Alder into their global dragnet. *See supra* footnote 5. But the plaintiffs cannot accomplish this result by mere words in their briefs.[7] If limits to extraterritorial jurisdiction mean anything, they mean that a would-be regulating nation cannot second guess the normal, natural and necessary business conduct of foreigners with other foreigners on foreign soil.

B. K.F. Alder Is A Wholly Foreign Entity That Acted Solely With Other British Firms In The United Kingdom In A Manner Invited By United Kingdom Law

There is no justification for the expansive reach of United States antitrust law sought by plaintiffs. K.F. Alder's legitimate and

7. In opposing the instant motion and seeking to require a foreign national to defend itself against the machinations of American litigation and the potential substantial liability and restrictions of the Sherman Act, it was incumbent upon the plaintiffs to come forward with something more than bare conclusory allegations. *See Furlong v. Long Island College Hospital*, 710 F.2d 922, 927 (2d Cir. 1983) ("conclusory statements [cannot] substitute for minimally sufficient factual allegations"). *Cf. Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986) (opponent of summary judgment motion must set forth specific facts showing no genuine issue for trial); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (opponent of summary judgment motion "may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial"). As the District Court concluded "the allegations [plaintiffs] made in their complaints and the facts they proffered in opposition to the motions represent their best effort" and thus the plaintiffs have not met their burden. A-78.

necessary business acts outside the United States ought not be subjected to the burdens of the Sherman Act.

K.F. Alder is a British company, wholly owned by British nationals, with its principal place of business in London, England. JA-11, 13 (Cal. Compl. ¶¶ 4(t), 12); JA-61-62, 68-69 (Conn. Compl. ¶¶ 4(h), 25). It is not alleged to have, and does not have, any American parent or affiliates. In addition, there is not a single allegation that K.F. Alder performed any act in the United States in furtherance of any alleged conspiracy. K.F. Alder is not alleged to have had any contact with plaintiffs (or with any other insurance consumer) or to provide comprehensive general liability insurance in the United States. The sole specific conduct allegation against K.F. Alder is that it attended a single meeting in London together with certain of the British defendants at which they allegedly agreed to the terms on which they would jointly underwrite reinsurance coverages. JA-32 (Cal. Compl. ¶¶ 94-95); JA-84-85 (Conn. Compl. ¶¶ 98-99).[8]

8. Contrary to the States' claim, the European Community Court of Justice has thus far declined to extend extraterritorial jurisdiction to conduct—even cartel conduct—by a foreign firm where that conduct is not *implemented* in the Community. Joined Cases 89, 104, 114, 116, 117 and 125 to 129/25, *A. Ahlstrom Osakeyhtio v. Commission* ("*Wood Pulp*"), 1988 E.C.R. 5193. The States have selectively quoted from this case, claiming that KEA was dismissed because it "'played [no] separate role'" and, thus the States conclude that KEA "added nothing to [that] case." State Brief at 30 n.31. In *Wood Pulp*, the European Community Court accepted jurisdiction over the members of KEA because they "implemented" their agreement within the Community. *Id.* at 5243 ("The decisive factor [in extraterritorial jurisdiction] is therefore the place where [the agreement] is implemented."). KEA was dismissed because it "played [no] separate role *in the implementation*" of the challenged agreements. *Id.* at 5245 (emphasis added).

The wholly foreign character of K.F. Alder and its conduct, combined with the facial legitimacy of its conduct, counsel dismissal.[9]

C. K.F. Alder Is At Most At The Outer Fringes Of Any Alleged Conspiracy

K.F. Alder's alleged conduct is far removed from the heart of the claims of plaintiffs, as consumers of primary insurance, to the manner in which primary insurance in the United States is written. K.F. Alder is at the far end of the continuum. By their own admission, the States challenge a scheme "first set in motion by American primary insurer defendants" to dictate the terms and availability of primary insurance in the United States. States Brief at 4. Indeed, the States admit that the "complaints focus not on [the London reinsurance] markets, but on *the market for insurance risks within the United States.*" States Brief at 17 n.17 (emphasis in original).

The core alleged conspiracy is among *American* primary insurers to limit insurance coverage for North American risks. JA-36-37 (Cal. Compl. ¶¶ 111-15). One step removed from this core allegation, certain reinsurers (but not K.F. Alder) allegedly conspired with the primary insurers, JA-37-43 (Cal. Compl. ¶¶ 116-30); JA-90-94 (Conn. Compl. ¶¶ 120-29), and engaged in

9. The respondents private party plaintiffs explicitly base their argument for extraterritorial jurisdiction on the contention that "within the United States, many of the[] foreign defendants also conspired and joined with the American defendants, for the same illicit purpose, in other unlawful conduct." Private Party Plaintiffs Brief at 43. However, the private party plaintiffs studiously ignore the fact that K.F. Alder is not alleged to have conspired with any American defendant or to have committed any act within the United States.

conspiratorial acts *in the United States*. JA-28-30 (Cal. Compl. ¶¶ 79-85); JA-80-82 (Conn. Compl. ¶¶ 82-89). And even more peripheral to the core complaint, certain reinsurers (but not K.F. Alder) allegedly refused to reinsure occurrence and long tail risks. JA-43-44 (Cal. Compl. ¶¶ 131-35); JA-92-94 (Conn. Compl. ¶¶ 125-29). Still further removed from the core conduct, certain reinsurers including K.F. Alder, in evaluating the risks they would collectively share, agreed that they would participate only in reinsurance of underlying primary insurance that contained a pollution exclusion. JA-45-46 (Cal. Compl. ¶¶ 136-40); JA-94-97 (Conn. Compl. ¶ 130-39). As its conduct relates to this action, K.F. Alder participates in *reinsurance*. Plaintiffs, however, are consumers of *primary* insurance, an entirely different product. K.F. Alder is on the outer fringes of these claims. Indeed, K.F. Alder is not merely remote from the core of the action; it is disconnected from it. K.F. Alder is a victim of a dragnet.

If relief were warranted in this case after trial, plaintiffs could get full relief without extraordinary extraterritorial jurisdiction. Jurisdiction over K.F. Alder is not necessary or important to exonerate the United States interest in free competition, because the actors closely related to the alleged wrong are before the District Court.

* * *

In this case the Court has an opportunity to define the limits of the extraterritorial reach of United States law. This Court has not yet addressed the application of United States antitrust law to one who, like K.F. Alder, has no corporate affiliation with any United States company, participates only in the London reinsurance market with respect to the claims at issue, is not alleged to have conspired with any United States company, is not alleged to have implemented any purported conspiracy in the United States, and

merely engaged in collaborative activity where collaboration was necessary if the product was to be available at all. Economics, fairness, and respect for other nations should counsel this Court to declare a limiting principle on extraterritorial jurisdiction and to dismiss the claims against Petitioner K.F. Alder. Such a limiting principle will legitimate expansive jurisdiction where necessary to deal with consensus wrongs.

CONCLUSION

For all of the foregoing reasons and for the reasons set forth in its brief on the merits, Petitioner K.F. Alder respectfully requests that as to K.F. Alder the judgment of the Court of Appeals for the Ninth Circuit on the London reinsurance claims be reversed, the judgment of the District Court for the Northern District of California be reinstated and all claims against K.F. Alder be dismissed for lack of subject matter jurisdiction, or alternatively, in the interests of comity.

Dated: New York, New York
January 22, 1993

Respectfully submitted,

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